89-633

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1989

OSCAR CIVELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 14, 1989

Question Presented

Whether petitioner's Fifth and Sixth Amendment rights to counsel and to Due Process of Law [*Herring v. New York*, 422 U.S. 853 (1975)], as well as F. Rule Crim. P. 30, were violated when, after the district court had indicated it would give only "actual knowledge" instructions and after petitioner had already given his summation tailored to that theory of knowledge culpability, the district court abruptly shifted to a "conscious avoidance' theory of knowledge in supplemental instructions, a theory upon which neither side tried the case or argued to the jury?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-titled proceeding on August 15, 1989, which affirmed petitioner's judgment of conviction.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is reported at 883 F.2d 191, and is reprinted in the Appendix hereto, beginning at p. 1a, *post.*

Jurisdiction

Petitioner was indicted, tried and convicted in the United States District Court for the Eastern District of New York of one count of conspiracy to possess cocaine with intent to distribute [21 U.S.C. §§841(a)(1), 841(b)(1)(C), 846] and one count of possession of more than 5 kilograms

of cocaine with intent to distribute [21 U.S.C. §841(a)(1), 841(b)(1)(A)(ii)(11); 18 U.S.C. §2]. Petitioner's appeal to the Second Circuit resulted in an affirmance on August 15, 1989.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked pursuant to 28 U.S.C. §1254(1). This petition is filed within the time permitted by Rule 20.1 of this Court.

Statute Involved

Federal Rule of Criminal Procedure, Rule 30:

> **Rule 30. Instructions.**
>
> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Statement of the Case

Introduction

Petitioner is a long-time resident alien from Argentina with no prior arrests. The charges against him evolved from police discovery of about 18 pounds of cocaine in a van he was driving. The contraband, in brick form, was packed in four closed, but unsealed, manila envelopes; petitioner had picked the packages up at the home of one Diego Bedoya in Staten Island, New York, and was on his way back to Queens, New York (some 20 miles away) when he was arrested. At the jury trial that ensued, the only contested issue was whether petitioner knew that the packages he carried in his van, and which he had possessed for only a few minutes, contained drugs.

The Government introduced circumstantial evidence which assertedly indicated petitioner's actual knowledge, and relied heavily on police testimony that petitioner had, in fact, directly admitted his culpable knowledge to the arresting officers during questioning.

Petitioner, on the other hand, testifying on his own behalf and bolstered by three character witnesses, denied any knowledge of the envelopes' contents, insisted that he was simply delivering packages, and that, like any common deliveryman, he did not look inside the packages he was given to transport.

The Government's Case

Unknown to petitioner, the Staten Island home where he picked up the packages had been under police surveillance; so when petitioner arrived, he was observed entering the house and then leaving it ten minutes later, packages in hand. None of the surveillance officers saw appellant look inside the packages.

Officers followed petitioner's van, and saw the van stop three times in Staten Island, with petitioner exiting the van each time to look behind him, then continue on his way. Petitioner drove across Staten Island and into Brooklyn, where he eventually stopped at a small market and made a phone call.

At that point, the officers approached petitioner as he was about to reenter the van. One officer testified that petitioner seemed very nervous during this encounter, particularly when the officer informed him that the Staten Island house he was just seen leaving was a suspected drug distribution center. The officer asked petitioner what was in the bags, and petitioner pulled out one bag and showed it to the officer. Before the officer could open the package, petitioner admitted that the bags contained cocaine, and also told police that he was paid $200 for the round trip.

The remaining three bags were then removed from the van. Each had a name written on the outside. The officers also recovered from petitioner's person a list of names, corresponding to the names on the envelopes, with a telephone number next to each name. A beeper was also recovered.

Cross examination attacked the officer's credibility, and focused on the fact that neither his daily activity report nor his surveillance report had noted that petitioner had driven and stopped his car suspiciously; nor did the officer reduce petitioner's confession to writing for him to sign. Cross examination also revealed that there were no hidden compartments in the van, and that petitioner had left the door to the van unlocked. The officer insisted, though, that petitioner had in fact admitted the packages contained drugs before, and not after, the packages were opened at arrest.

The Defense

Petitioner, who at the time of trial was a waiter, had once worked for a local messenger service,[1] and had operated a deli/candy store in Queens for several years, an enterprise he closed down when he could not afford the rent on the new lease.

For a number of years, including when he operated his store, petitioner had also offered his services as a free-lance moving man, and had posted a business card in his shop to announce his availability as mover. Petitioner estimated that during 1987 he had earned about $1,500 from this work.

Amongst his store customers were the Bedoyas, who had hired him on four prior occasions to move household items between various metropolitan locations, including three trips to the Bedoya home on Staten Island.

On the day of his arrest, Bedoya phoned petitioner at home and asked him to come to Staten Island to pick up something for a delivery, with Bedoya assuring him that the trip would not take too long. Petitioner drove the 20 miles to Bedoya's home, where Bedoya handed him the four bags. Bedoya also dictated the list of names and phone numbers, and gave him a beeper, telling him that a man named Freddie would reach him on the beeper to arrange pick-up of the packages. Bedoya gave no further information or instructions about the transport or handling of the packages, and after haggling about the price for the round trip, the two men settled on a price of $100.

Petitioner insisted that he had no idea what was inside the envelopes, but that he assumed they contained costume jewelry, as Bedoya had once told him he was in that business. Petitioner also sharply disputed key portions of the officer's testimony, taking particular pains to stoutly

[1] A document admitted into evidence showed that the messenger service had issued him a beeper for use in his work.

deny that he had stopped the van suspiciously, and to deny that he had admitted that he knew the envelopes contained cocaine. Petitioner was adamant that when the officers retrieved the bag and opened it, they said, "You know what this is—this is cocaine." Petitioner, who had seen cocaine only on TV and in the movies, said, "Well, it looks like cocaine." He insisted that he did not know the envelopes contained drugs until the officer showed him the contents.

Petitioner also produced three character witnesses: a veteran police officer and former customer at petitioner's store, an attorney who worked for the City of New York, and the head of a local chamber of commerce who was petitioner's tax accountant.

Summations

Before summations, the district judge gave counsel a copy of the jury instructions he intended to give.

In its opening summation, the Government reviewed the police testimony, emphasizing petitioner's admission of knowledge of the envelopes' contents. The Government further argued that petitioner's trial testimony couldn't possibily be true because Bedoya would not have entrusted him with valuable and unsealed packages of cocaine unless Bedoya already knew that petitioner was aware of the contents and how to handle them. The Government characterized petitioner's denials and his contradiction of the police testimony as "consciousness of guilt," and his story as unworthy of belief, and that only the officers were telling the truth.

The defense summation responded in kind. Arguing that police can lie and "puff," and noting the absence of any corroborating detail in the written police reports and the fact that petitioner had been under consistent surveillance but was not seen to have opened the bags, the defense pointed to the character evidence and asserted that

petitioner was telling the truth when he denied knowledge of the contents of the envelopes.

The Jury Instuctions

The instructions were straightforward and routine, and included the "knowledge" instruction that had been shown to counsel before summations:

> I wish to discuss one element which is common to both Counts One and Two and which the government must prove beyond a reasonable doubt. Before the defendant may be found guilty of possessing cocaine with intent to distribute it, or conspiracy to possess cocaine with intent to distribute it, the government must prove beyond a reasonable doubt that the defendant knew the packages in the van contained cocaine.
>
> In determining whether the government proved the requisite element of knowledge, you may consider all the facts and circumstances and all the inferences which could be logically drawn therefrom, provided that such evidence satisfies you beyond a reasonable doubt that the defendant knew he was in possession of cocaine.

At no time, neither before nor after the instructions, did either side request any instructions or voice objections to the charge as given.

The Jury Note and the Court's Supplemental Instructions

In the midst of deliberations, the jury sent a note to the court asking whether it could find petitioner guilty if he hadn't looked inside the envelopes but had "suspected" they contained drugs.

The district judge immediately suggested that a "conscious avoidance" instruction would be appropriate, but

defense counsel, distressed that this theory be injected into the case so late, asked "You're going to charge 'conscious avoidance' now?" After further prompting by the Government, and without permitting counsel to give a supplemental summation addressing that theory, the court issued an instruction defining the elements of "conscious avoidance" as follows:

> If you find from all the evidence beyond a reasonable doubt that the defendant was aware of a high probability that cocaine was hidden in those envelopes, but deliberately closed his eyes to that probability, you may treat his deliberate avoidance of positive knowledge, that's the equivalent of knowledge.

The jury convicted, and petitioner was later sentenced to a mandatory 10-year term for the possessory count and to a 78-month guideline sentence on the conspiracy count.

The Appeal

Petitioner's central argument was that the sudden interjection of a "conscious avoidance" theory of knowledge culpability in the supplemental instructions—after the entire case had been tried by *both* sides only on a theory of "actual knowledge" and after the defense had been told that the case would go to the jury only on an "actual knowledge" theory and had tailored his summation only to that theory—trenched upon his Sixth and Fourteenth Amendment right to present closing argument [*Herring v. New York*, 422 U.S. 853 (1975)] and violated the purposes of F. R. Crim. Proc. 30.

The Court of Appeals recognized that the "requirement that counsel be informed of the instructions to be given before closing argument is an important safeguard of the right to a full and fair trial by jury" [11a-12a], but rejected the argument on the grounds that (a) "the question of

appellant's conscious avoidance of knowledge concerning the contents of the envelopes was a close logical complement of the arguments and evidence already given" [12a]; and (b) the issue was imperfectly preserved as counsel's objection to the timing of the instruction ["You're going to charge conscious avoidance now?"] was too imprecise and counsel did not ask to re-open his summation to address the conscious avoidance question [8a].

REASONS FOR GRANTING THE WRIT

I.

The Court should clarify the underlying assumption in *Herring v. New York*, 422 U.S. 853 (1975), by explicitly applying the holding in that case to jury trials in criminal cases.

The opportunity to present closing argument is more than a discretionary courtesy extended to counsel. It is, instead, a matter of federal constitutional right, "a basic element of the adversary factfinding process" and the "last clear chance to persuade the trier of fact that there may be a reasonable doubt of the defendant's guilt . . . the opportunity to finally marshall the evidence for each side before submission of the case to judgment." *Herring v. New York*, 422 U.S. 853, 858, 861 (1975).

These precepts were given short shrift by the ruling below, probably because this Court has never explicitly held that a criminal defendant has a right to present a summation to the jury on the elements of the offense charged against him.

Herring, of course, dealt specifically only with whether a criminal defendant had a constitutional right to sum up in a *judge* trial. Though this Court implicitly assumed that there was a constitutional right to sum up in a *jury* trial and cited some 26 state cases for that proposition [422

U.S. at 858, n. 8], it cited none of its own cases and no federal cases which have explicitly so held; and our research has disclosed none. The record in this case presents an appropriate opportunity to render the implicit into the explicit, the assumed into the announced.

From beginning to end, petitioner steadfastly claimed that he did not know that the packages Bedoya paid him to carry contained drugs, that Bedoya never told him what the packages contained, and that he didn't look into the packages any more than any moving man would look into packages consigned for hired delivery. With equal steadfastness, the Government—from its opening statement through its choice of witnesses and in its own summation—has claimed that petitioner had *actual* knowledge of what he was carrying, indeed, that he had *confessed* his knowledge to the arresting officers, and that his protestations to the contrary on the witness stand were unworthy of belief. At no point prior to jury deliberations did the Government seek "conscious avoidance" instructions. In sum, this case was tried as a simple credibility battle between the arresting officers and a hard-working taxpayer with no criminal record whose reputation for honesty was vouched for by three unimpeachable character witnesses.

Accordingly, the district court's original instructions, which it had showed to counsel before the court commenced instructions, consisted of the routine instructions suitable for a routine case of this sort, taking special note only of the single contested issue—petitioner's knowledge—in the standard chargebook[2] language of "actual knowledge."

Matters abruptly shifted when, in the midst of its deliberations, the jurors sent in a note asking whether petitioner could be found guilty if he had "suspected" he

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[2] *See, e.g.*, Devitt & Blackmar, *Federal Jury Instructions in Criminal Cases*, at §14.08; Sand, *et al.*, *Modern Federal Jury Instructions*, #56-8.

was carrying cocaine but didn't look in the packages. This was a telling question, as it indicated that the jury rejected the sole theory of knowledge liability advanced by the Government, *i.e.*, that petitioner had *actual* knowledge of the contents and had so admitted to police. Nonetheless, and despite a defense objection ["You're going to charge 'conscious avoidance' now?"], the district court gave the jury a new theory of knowledge liability upon which neither side, but most importantly the defense, had addressed at any previous point in the trial or in summation.

The abrupt post-summation shift in the theory of knowledge liability offered to the jury, and by which they were allowed to find petitioner guilty, deprived him of a fair chance to argue against that theory to the jury.

The straightforward and routine "actual knowledge" instruction the judge promised to, and did, give was a far cry from the theory of knowledge explained by the "conscious avoidance" supplemental instruction. While "actual" knowledge required a finding simply that petitioner "knew that the packages contained cocaine," the Johnny-come-lately "conscious avoidance" theory involved an elaborate review of scattered factual data and required a tripartite finding that petitioner (a) was aware (b) of a high probability that cocaine was inside the packages and (c) deliberately closed his eyes to that probability. Indeed, even the trial judge recognized that he was introducing something very new and different into the case, as the "conscious avoidance" theory was explicitly set forth in the disjunctive, as an alternative to the actual knowledge theory he had originally charged.[3]

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[3] It is true, of course, that the case law, the commentators and even the Model Penal Code [§202(7)] have concluded that a defendant's "conscious avoidance" of knowledge carries with it the same culpability quotient as "actual knowledge." *See generally*, discussions in *United States v. Morales*, 577 F.2d 768, 773-775 (2d Cir. 1978); *United States v. Lanza*, 790 F.2d 1015, 1021-1024 (2d Cir. 1986); 1 LaFave & Scott, *Substantive Criminal*

(footnote continued on following page)

Counsel thus never had a chance to argue against the tripartite elements of "conscious avoidance"[4] and never had the opportunity to marshall the facts against such a finding. The jury was simply never given the defense view of how the facts on the record might have been construed in petitioner's favor, and how the evidence actually *countered* any conclusion that there was a "high probability" that the packages contained cocaine, that the petitioner was "aware" of that high probability, and that he "deliberately closed his eyes" to it. For all practical purposes then, the jury's verdict, based solely on the "conscious avoidance" instruction, was unnourished by any defense input on the distinct elements of that theory of knowledge culpability or of the facts that might have been marshalled to support it.[5] In a word, petitioner had no "opportunity finally to marshall the evidence before submission of the case for judgment" [*Herring, supra,* at 858].

(*footnote continued from preceding page*)

Law, § 3.5 at pp. 307-308. Nonetheless, the two bases of liability are as distinct in theory, and thus in the facts that might be marshalled to the jury, as the liability of an aider is distinct in theory and fact from the liability of a principal, though each be equally culpable [*United States v. Gaskins,* 849 F.2d 454 (9th Cir. 1988).

[4] "Conscious avoidance" instructions, quite apart from the *Herring* and Rule 30 problems present here, have long been controversial [*see, e.g., United States v. Murrieta-Bejarano,* 552 F.2d 1323, 1326 (9th Cir. 1977) [Kennedy, J., concurring in part and dissenting in part] and have been a fertile field of appellate litigation for years, generating many petitions for certiorari to this Court [*see* cases collected at Devitt & Blackmar, *Federal Jury Instructions in Criminal Cases,* at §14.09, "Guilty Knowledge"]. Since counsel's objection to the supplemental instruction went solely to its timing rather than its content, we do not raise any issue here with respect to the substance or merits of the "conscious avoidance" language itself.

[5] The defense could have marshalled many record facts against the three elements of "conscious avoidance": (1) petitioner, who had no criminal record, had been called out to the Bedoya home in broad daylight, during normal mid-week working hours, by

(*footnote continued on following page*)

II.

The Court should eliminate the apparently disparate application of F. R. Crim. Proc. 30 by the Second Circuit.

Although F. Rule Crim. Proc. 29.1[5] specifies the sequence which each party's summation is to be given, it is

(*footnote continued from preceding page*)

someone who had hired him on other occasions to perform moving services; (2) the job he was asked to perform was within the range of delivery jobs he had performed with his van for others; (3) he had prior experience not only as a self-employed mover, but had previously worked for a messenger service which, according to the Government's own documents, had provided him with a beeper; (4) the Government never offered proof that the amount petitioner was paid to make a last-minute 35-mile round trip was distinctively and suspiciously higher than the fee that any other licensed courier would have charged for the same service; (5) the Government, which had searched the Bedoya home a few hours later, produced no evidence that there were conspicuous accoutrements of drug trafficking open and visible in the home, such as scales, packaging equipment, diluents, cash, weapons, or a steady in-and-out traffic of strangers; (6) Bedoya gave petitioner no special instructions on how to handle, store or protect the packages, and gave him no weapon, all of which might otherwise have put petitioner on notice of their unusual and highly priced contents. These facts, though extraneous to the simple "actual knowledge"/credibility case both sides had presented, were central to any jury evaluation of petitioner's (a) awareness (b) of a high probability that cocaine was hidden in the packages and (c) deliberate eye-closing—the elements of conscious avoidance submitted to the jury.

[5] The Court of Appeals made much of the fact that petitioner's counsel did not ask to reopen summations to address the newly-injected "conscious avoidance" theory and its distinctive elements. The plain fact of the matter is, though, that the Rules of Criminal Procedure do not authorize a reopening of summations. The mandatory language of Rule 29.1 as well as the 1975 Advisory Committee notes make it clear that one of the rule's purposes was to enact a *uniform* federal practice. True, the case law reveals isolated instances where either counsel requests to

(*footnote continued on following page*)

Rule 30 which was designed to prevent the kind of trial-by-surprise sandbagging that occurred here. That rule was intended "to require the court to inform the trial lawyers in a fair way what the charge is going to be, so that they may intelligently argue the case to the jury" *Ross v. United States,* 180 F.2d 160, 165 (8th Cir. 1950).

Though the cases interpreting Rule 30 differ to some degree on the finer quibbles of its applicability [see generally, Annotation, *Court's Duty to Inform Counsel of Proposed Action on Requested Jury Instructions Under Rule 30,* 40 ALR2d 495], the decisions are unanimous to the effect that a court's actual instructions may not materially depart from promised instructions to the detriment of the defense ability to address and marshall germane factual arguments. *Gaskins, supra* [at charging conference, court told counsel that it would instruct jury on defendant's liability as principal; actual instructions charged on aiding and abetting; *held:* though culpability is the same under either theory, each involved different legal and factual theories, and reversed conviction]; *United States v. Wander,* 601 F.2d 1251, 1260-1262 (3d Cir. 1979) [prejudicial Rule 30 violation where, after summations, court changed theory of extortion liability it had told counsel it would give before summation]; *United States v. Blackmon,* 838 F.2d 900, 910 (2d Cir. 1988) [same, with regard to vicarious *Pinkerton* liability instruction in conspiracy case].

(*footnote continued from preceding page*)

reopen [*Gaskins, supra*] or where the court invites a reopening [*United States v. Gleason,* 616 F.2d 2, 26 (2d Cir. 1979)]. But in the final analysis, a reopening of a summation is a highly unorthodox event of dubious validity under Rule 29.1; given the gravity of the prejudice which petitioner suffered by dint of the abrupt shift in theories of knowledge, it seems grossly unfair to tax him with a procedural forfeiture for failing to think of it. Indeed, we know of no similar case where failure to seek a reopening operated to forfeit review of a right to summation or Rule 30 claim.

Thus, whether this case is viewed as a *Herring* case or as a Rule 30 case, the upshot is the same: because counsel tailored his summation to the only theory of knowledge the entire case was tried on and to the only theory of knowledge the trial judge said he would charge the jury, the abrupt shift after summations from actual knowledge to the distinctly different theory of "conscious avoidance" deprived the petitioner of the opportunity to address the only theory upon which the jury found him knowingly culpable. The criminal trial mill is not so short of grist that it need countenance a conviction obtained by such sandbagging.

CONCLUSION

For the foregoing reasons, this Court is respectfully urged to grant this petition for certiorari.

Respectfully submitted,

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Dated: October 14, 1989

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1321—August Term, 1988

(Argued: June 22, 1989 Decided: August 15, 1989)

Docket No. 89-1073

UNITED STATES OF AMERICA,

Appellee,

—v.—

OSCAR CIVELLI,

Defendant-Appellant.

Before:

MESKILL, PIERCE, and MAHONEY,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Korman, *J.*), convicting appellant on two counts of narcotics violations. Appellant contends on appeal that the district court erred when, in response to a question from the jury, it gave a supplemental charge regarding "conscious avoidance."

Affirmed.

STANLEY NEUSTADTER, Esq., New York, N.Y., *for Defendant-Appellant.*

JACQUES SEMMELMAN, Assistant United States Attorney, Brooklyn, N.Y. (Andrew J. Maloney, United States Attorney for the Eastern District of New York, John Gleeson, Assistant United States Attorney, Brooklyn, N.Y., of counsel), *for Appellee.*

PIERCE, *Circuit Judge*:

Oscar Civelli appeals from a judgment of the United States District Court for the Eastern District of New York (Korman, *J.*) convicting him of conspiracy to possess cocaine with intent to distribute, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 846, and possession of in excess of five kilograms of cocaine with intent to distribute, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii)(II), 18 U.S.C. § 2. At the time he was apprehended, appellant was carrying in his van almost nine kilograms of cocaine in four large manila envelopes. The openings to the envelopes were folded over, but not sealed. At his trial, appellant testified that he was simply delivering the packages, and that he did not know what was inside the envelopes. Although both sides' closing arguments and the court's instructions focused on appellant's actual knowledge, during the course of deliberations the jury sent a note to the court asking whether it was enough that appellant *suspected* that he was carrying narcotics. In response, the court discussed the matter with counsel and, with no meaningful objection from defense counsel, gave the jury a supplemental instruction regard-

ing appellant's possible "conscious avoidance" of knowledge of the contents of the packages. On appeal, appellant contends that the court erred in giving the supplemental instruction because (1) the evidence was not sufficient to warrant a conscious avoidance charge, and (2) the appellant was never afforded an opportunity to argue the question of conscious avoidance to the jury. For the reasons stated below, the judgment of the district court is affirmed.

BACKGROUND

On the morning of April 22, 1988, appellant received a telephone call at his Queens, New York apartment from one Diego Bedoya, who asked appellant to drive to Bedoya's home in Staten Island, New York, to make a delivery for him. (Bedoya's conviction and sentence were the subject of an earlier decision of this court, *United States v. Bedoya*, No. 88-1554 (2d Cir. June 23, 1989) (*per curiam*)). Appellant had on occasion offered commercial delivery and moving services, and he had moved household items for Bedoya and his wife several times before. Appellant left his apartment shortly thereafter, and drove in his van to Bedoya's home on Staten Island. Bedoya's home was under surveillance by a joint federal/city narcotics task force, as a suspected center of narcotics distribution. Appellant was observed arriving at the house shortly after 1 p.m., and emerging approximately ten minutes later, carrying four large tan envelopes. As appellant drove away, he was followed by two officers from the task force.

One of the officers, Detective Pritchard, subsequently testified that appellant drove for a few blocks and then pulled over to the curb, alighted from the van, walked

toward the rear of the vehicle while looking back at approaching traffic, and then reentered the van and proceeded further. Pritchard testified that appellant stopped twice more, again leaving the van and looking to the rear; he finally drove across the Verrazano Narrows Bridge into Brooklyn. Once in Brooklyn, appellant left the highway and stopped at a small supermarket, where he made a call from a public telephone.

The officers from the surveillance team approached appellant as he was about to reenter his van. While one officer asked appellant for his license and registration, the other peered into the van and saw the four envelopes. Detective Pritchard testified at trial that appellant appeared extremely nervous during this questioning. The officers told appellant that the house he had left in Staten Island was suspected of being a center of drug trafficking, and they asked him what was in the packages in the van. Appellant pulled one of the envelopes from the van to show the officers. At the officers' request, Civelli opened the package. Detective Pritchard examined the contents, and discovered several bricks of cocaine. The officers then placed Civelli under arrest; the other three envelopes which were seized also contained cocaine.

The officers recovered a total of approximately 8.5 kilograms of 96% pure cocaine from the four envelopes, packed in brick form. Each envelope was folded shut, not sealed, and each had a name written on the outside. The officers also recovered a telephone beeper and a list of names from appellant. The list was in Civelli's handwriting, and the names on the list corresponded to the names on the envelopes. There was a telephone number next to each name on the list, and a circled digit which corre-

sponded to the number of bricks of cocaine in each of the labeled envelopes.

Appellant was indicted for conspiracy to possess cocaine with intent to distribute, and possession of in excess of five kilograms of cocaine with intent to distribute. A third count, involving use of a firearm, was dropped on the government's motion prior to trial, but Civelli was convicted after a three-day trial on the conspiracy and distribution counts.

The key question at trial, as identified in opening and closing statements, was whether appellant knew he was carrying narcotics. Detective Pritchard testified appellant had acknowledged that the packages contained cocaine *before* the first envelope was opened. Appellant, who testified in his own defense, vigorously denied that he made such a statement. He testified that he never knew what was inside the packages until they were opened by the officers. He conceded that he had prepared the list of names seized by the police, but he stated that he had transcribed the list verbatim at Diego Bedoya's direction and, further, that Bedoya was to pay him only $100 to take the packages. Appellant testified that Bedoya had told him a person named "Freddie" would use the beeper to page appellant at his place of work, and Freddie would pick up the packages from appellant.

In summations, the government argued that appellant had actual knowledge of the contents of the packages; the defense argued that appellant was just an innocent dupe in a broader narcotics distribution ring. The court's instructions to the jury were also directed to appellant's actual knowledge. Judge Korman instructed the members of the jury that, in order to find the defendant guilty on either the conspiracy or the substantive count, they had to find

that the government had "prove[d] beyond a reasonable doubt that the defendant knew that the packages in the van contained cocaine."

During the course of deliberations the jury sent a note to Judge Korman asking:

> If Oscar Civelli suspected that he was carrying cocaine, but didn't look in the package[,] would that have constituted conspiracy?

The note precipitated the following colloquy:

> THE COURT: It seems to me an appropriate charge is the conscious avoidance charge.
>
> MR. JENKS [for appellant]: You're going to charge conscious avoidance now?
>
> THE COURT: There is no yes or no answer [to the note] in a meaningful way.
>
> MR. SHERIDAN [for the government]: If the charge is conspiracy, which as we know, as I know, your charge is in agreement. I don't see [why] looking in the bag is the sine qua non for the crime. It seems to me the question is, [Y]ou have to look in the package to have been involved in the conspiracy[?]
>
> THE COURT: The point that you make is one of the reasons why it's difficult to answer the question yes or no.
>
> Obviously he had to look in the bag, he had to agree to possess cocaine and that would be enough. But in the context of this case, looking at the facts of this case and the way the case is tried, there is no way that he can be guilty of conspiracy if he doesn't know, if you believe him.

MR. SHERIDAN: But he could know without looking in the bag—

MR. JENKS: I don't think the question can be answered with a yes or no.

THE COURT: If he entered into a conspiracy—but as the case is tried there is no way to convict unless the jury feels he knew cocaine was in the bag. If the jury is operating on some assumption he may have suspected it but didn't look, the best way to deal with it and the fairest way is the [conscious] avoidance charge . . . .

> [Discussion between the court and the prosecutor of the charge required under *United States v. Feroz*, 848 F.2d 359 (2d Cir. 1988).]

THE COURT: I remember when I read *Feroz*, that it was something that I usually gave, the full charge.

Read this.

(Mr. Sheridan and Mr. Jenks perusing document handed to them by the Court.)

MR. SHERIDAN: This charge incorporates what the Second Circuit says must be incorporated.

THE COURT: . . . Bring the jury in.

The court delivered its charge regarding conscious avoidance to the jury, and, after resuming deliberations, the jury thereafter returned verdicts of guilty on both counts. The court subsequently sentenced appellant to a term of 78 months' imprisonment on the conspiracy count, to run concurrently with a mandatory minimum sentence of 10 years' imprisonment on the substantive count. This appeal followed.

DISCUSSION

Appellant presents two claims on appeal, both of which stem from the supplemental conscious avoidance charge given the jury. First, he contends that the record evidence did not warrant a conscious avoidance charge. Second, he argues that, even if there was a sufficient factual predicate for giving the charge, the district court erred by not affording appellant an opportunity to argue the question of conscious avoidance via summation to the jury.

We note at the outset that appellant's claims are severely undercut by his failure to make a proper objection at trial to the district court's proposed instruction. Counsel's almost casual complaint—"You're going to charge conscious avoidance *now*?" (probable emphasis)—in no way qualifies as the distinct and well-grounded objection required by Rule 30 of the Federal Rules of Criminal Procedure. To preserve a question for appellate review, the objection must direct the trial court's attention to the contention that is to be raised on appeal. *See United States v. Lanza*, 790 F.2d 1015, 1021 (2d Cir.), *cert. denied*, 479 U.S. 861 (1986). This, defense counsel plainly failed to do. Counsel's further comments during colloquy with the court only compounded his earlier failure, for his comments were expressions of acquiescence, not exception. Furthermore, defense counsel failed to request that he be allowed to reopen his summation to address the question of conscious avoidance.

Since appellant's objections to the conscious avoidance charge are essentially being raised for the first time on appeal, "the question before us is whether the district judge's inclusion of the conscious avoidance [charge] constituted plain error." *Lanza*, 790 F.2d at 1021; *see* Fed. R. Crim. P. 52(b). Thus, we may not reverse unless we believe

that there has been a miscarriage of justice which denied the defendant a fair trial. *United States v. Kallash*, 785 F.2d 26, 29 (2d Cir. 1986) (citing *United States v. Frady*, 456 U.S. 152, 163 (1982)); *see United States v. Cano*, 702 F.2d 370, 371 (2d Cir. 1983). As our discussion below reveals, no miscarriage of justice occurred here since the district court's conscious avoidance instruction was a proper response to the jury's inquiry.

I. *The Factual Predicate for the Charge*

A conscious avoidance charge is appropriate when two conditions have been met. *See United States v. Mang Sun Wong*, No. 88-1100, slip op. at 7541 (2d Cir. June 1, 1989). First, the defendant must—as did the appellant herein—contest some specific aspect of knowledge necessary for conviction. *Id.* (citing *Lanza*, 790 F.2d at 1022); *see also United States v. Beech-Nut Corp.*, 871 F.2d 1181, 1195-96 (2d Cir. 1989) (issues of knowledge properly addressed by conscious avoidance charge).

Appellant's challenge is directed at the second requirement: that there be an adequate factual predicate for the charge. Our analysis of this question is guided by our decisions in *Mang Sun Wong* and *United States v. Guzman*, 754 F.2d 482 (2d Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). In *Guzman*, as here, the district court responded to an inquiry from the jury by giving a supplemental charge on conscious avoidance. Our holding in *Guzman*, recently reaffirmed in *Mang Sun Wong*, was that such a charge was proper where the "surrounding circumstances were such that reasonable persons could have concluded that the circumstances alone should have apprised defendants of the unlawful nature of their conduct." *Id.* at 489 (citing *United States v. Mohabir*, 624 F.2d 1140, 1154 (2d Cir.

1980)); *see Mang Sun Wong*, slip op. at 7541-42. Noting again that we may reverse herein only on a showing of plain error, we must review the record to determine whether the evidence before the district court was sufficient to support a charge on conscious avoidance.

During cross-examination appellant conceded that, though he was expected at work later in the afternoon on the day of his arrest, he went directly to Bedoya's house without first asking Bedoya how long the delivery would take. Once there, appellant asked no questions of any substance; instead, he merely took instructions and accepted a beeper from Bedoya. According to Detective Pritchard's testimony, after appellant left Bedoya's house and was driving across Staten Island, he stopped several times—looking around each time—apparently in an effort to determine whether he was being followed. The planned delivery itself was plainly not a straightforward one, but was instead (on appellant's own testimony) to involve a beeper page, and then a transfer to an unknown man named "Freddie." Appellant testified that he was to give the packages and the list of names to Freddie. In light of this evidence, which tended reasonably to show that circumstances should have apprised appellant of the unlawful nature of his conduct, *see United States v. Joyce*, 542 F.2d 158, 161 (2d Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977), there was no plain error in the district court's decision to give the jury the supplemental charge on conscious avoidance.

II. *The Propriety of the Charge After Closing Arguments*

Appellant's second claim is that the court, by giving a conscious avoidance charge *after* closing arguments had been made, denied appellant an opportunity to address the

jury on the substance of that charge. Appellant points out that Rule 30 of the Federal Rules of Criminal Procedure requires the court to inform counsel of its proposed instructions *before* closing arguments, so that counsel will have a fair opportunity to tailor arguments to those instructions. *See* 2 C. Wright, *Federal Practice and Procedure* § 482, at 685 (1982). Appellant contends that it was a violation of Rule 30 for the district court to give its supplemental charge on conscious avoidance without affording appellant an opportunity to argue the question to the jury.

Appellant notably does not challenge the substance of the charge itself, *cf. United States v. Christmann*, 298 F.2d 651, 653-54 (2d Cir. 1962), but rather only the circumstances in which it arose. If a supplemental charge is legally correct, the district court enjoys broad discretion in determining how, and under what circumstances, that charge will be given. *See United States v. Bayer*, 331 U.S. 532, 536 (1947); *United States v. Burke*, 700 F.2d 70, 80 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Castaneda*, 555 F.2d 605, 611 (7th Cir.), *cert. denied*, 434 U.S. 847 (1977); *United States v. Neville*, 516 F.2d 1302, 1305 (8th Cir.), *cert. denied*, 423 U.S. 925 (1975). That discretion is even broader in this case, for, as noted, in the absence of a proper objection before the district court we will reverse only if the supplemental charge gave rise to plain error. *See United States v. Kallash*, 785 F.2d 26, 29 (2d Cir. 1986); Fed. R. Crim. P. 52(b). On the facts herein, we hold that the district court's decision to give the supplemental charge after the summations were closed and deliberations had begun was clearly not plain error.

We recognize that Rule 30's requirement that counsel be informed of the instructions to be given before closing argument is an important safeguard of the right to a full

and fair trial by jury. We also recognize that the district court's discretion regarding supplementary instructions is not without limits, *see United States v. Bolden*, 514 F.2d 1301, 1308 (D.C. Cir. 1975), and that there are special cases where the principles that underlie Rule 30 may very well require that the district court allow further argument after an instruction has been given, *see United States v. Blackmon*, 839 F.2d 900, 910 (2d Cir. 1988); *Loveless v. United States*, 260 F.2d 487, 488 (D.C. Cir. 1958) (per curiam).

This, however, is not such a case. We simply "cannot agree that '[t]he critical goal of good argument was vitiated by the . . . instruction.' " *United States v. Viserto*, 596 F.2d 531, 539 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979). Both sides' closing arguments drew upon the evidence presented in the case in their respective efforts to show that appellant did, or did not, know that he was carrying narcotics. In the wake of these arguments that focused so narrowly on appellant's knowledge, the question of appellant's conscious avoidance of knowledge concerning the contents of the envelopes was a close logical complement of the arguments and evidence already given. Thus, in the context in which it arose, the supplemental charge did not so grossly "deviate[ ] from the path of trial that the parties had already pursued" as to cause a miscarriage of justice. *See id.* Having found no plain error in the court's decision to give the instruction, we conclude that this claim on appeal also must fail.

CONCLUSION

We have considered all of appellant's arguments and, for the reasons set forth above, the judgment of the district court is affirmed.